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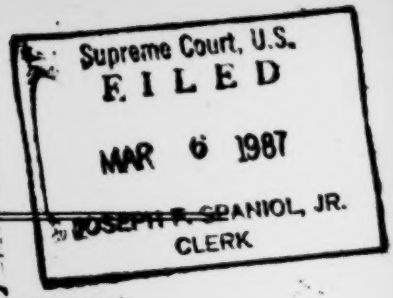

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA, STATE COURT RECEIVER FOR FAR WEST ADMINISTRATORS, INC., CONTINENTAL ORGANIZATION OF MEDICAL, PROFESSIONAL AND TECHNICAL EMPLOYEES, and FINCOMP INSURANCE MARKETING, INC.,
Petitioner,

VS.

KENNESAW LIFE and ACCIDENT COMPANY,
a Georgia corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

KENT KELLER
GAIL E. COHEN
LARRY M. GOLUB
BARGER & WOLEN
530 West Sixth Street
Ninth Floor
Los Angeles, California 90014
Phone: (213) 680-2800

Attorneys for Petitioner

March 3, 1987

Bowne of Los Angeles, Inc., Law Printers (213) BOWNE CO

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Eleventh Circuit, in reweighing the evidence and reversing the findings of the district court, misapplied the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals for the Eleventh Circuit erred in ignoring the tracing of funds requirement under Georgia trust law.

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VS.

KENNESAW LIFE and ACCIDENT COMPANY,
a Georgia corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari be issued to review the judgment and opinion entered on December 17, 1986, by the United States Court of Appeals for the Eleventh Circuit, reversing a judgment entered in favor of petitioner in an interpleader action by the United States District Court for the Northern District of Georgia.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit has not yet been reported. A copy of this opinion is attached to this petition as Exhibit "A" of the Appen-

dix to the petition. The unreported Findings of Fact and Conclusions of Law issued by the District Court for the Northern District of Georgia in this case are attached as Exhibit "B" of the Appendix to the petition.

JURISDICTION TO REVIEW

The opinion of the Court of Appeals for the Eleventh Circuit was rendered on October 7, 1986. A petition for rehearing was filed, and the Court of Appeals entered final judgment against the petitioner on December 17, 1986.

The jurisdiction of this Court is invoked under Section 1254(1) of Title 28, United States Code.

INTRODUCTION

What "special and important" reasons for granting the requested writ exist in this run-of-the-mill interpleader? Just this: the Eleventh Circuit's decision is at war with Rule 52(a) of the Federal Rules of Civil Procedure. For obvious reasons, the Eleventh Circuit did not like the district court's judgment. To reach a contrary judgment, the Eleventh Circuit reweighed the evidence, disregarded ample factual support for the district court's judgment, ignored all credibility issues, and gave its own decision even though the district court's decision is unquestionably "plausible in light of the record viewed in its entirety . . ." *Anderson v. City of Bessemer City, N.C.*, ____ U.S. ____, 105 S. Ct. 1504, 1511 (1985). In short, the Eleventh Circuit touched all the bases in its disregard of Rule 52(a).

To make matters worse, the Eleventh Circuit decision is clearly wrong. Just for openers, the decision gives the new prevailing party — a Georgia insurer — a $200,000 windfall. As we explain below, Respondent's theory of the case was that the fund — an account slightly in excess of

$450,122 — belonged to it, even though the account was not in its name, because the amount in the account roughly equalled unpaid premiums owed Respondent. Respondent's theory, however, unravels when one recognizes that Respondent failed to account for some $200,000 in payments it received in February 1982.

In summary, in addition to the battering Rule 52(a) receives, the decision is inherently unfair. Respondent, rather than the thousands of patients and medical providers who are creditors of the Far West et al. entities, gets the $450,000-plus fund, even though Respondent was only owed approximately $250,000. Yes, it's a small case, but the injustice is great and the reasons for a hearing before this Court are compelling.

STATEMENT OF THE CASE

This appeal concerns an interpleader action filed by plaintiff National Bank of Georgia ("NBG"), the disinterested stakeholder of a $450,000 bank account. Jurisdiction of this matter is based upon 28 U.S.C. Section 1332(a)(1) and 28 U.S.C. Section 1335(a)(1). The two claimants to the NBG bank account are Petitioner Credit Managers Association of Southern California ("CMA"), a California organization, and Respondent Kennesaw Life & Accident Insurance Company ("Kennesaw"), a Georgia corporation.

CMA claimed the NBG account as receiver for COMPETE, an insolvent California organization which provided health benefits on a group basis to various small employers and their employees.

COMPETE was organized to offer health benefits to the employees of its employer members in exchange for periodic membership fees. COMPETE offered the health care benefits through an entity operating under the name

COMPETE or the COMPETE Master Trust ("CMT"), which was declared on or about February 21, 1981, and redeclared by a document entitled "Restatement of Trust," dated June 19, 1981. (CMA Trial Exhibit No. 1; 1SR-1-59; FF 5.)[1] CMT provided benefits both by purchasing insurance policies through independent insurers and by self-insuring certain programs with the use of its membership dues.

In or about June 1981, CMT purchased a $25,000 excess reinsurance policy for its self-insured or self-funded program from Kennesaw (the "01 policy").

Shortly thereafter, Kennesaw issued a second insurance policy to CMT (the "02 policy"). That policy provided 100% or full health insurance coverage without any self-funded coverage through CMT. (Kennesaw Trial Exhibit No. 5; FF 8.) Thus, at all times from July 1, 1981 until March, 1982, when CMT was placed in receivership, there were at least two separate insurance programs being run under the authority of the Restatement of Trust.

The actual administration of these two insurance programs, including the collection of premiums or membership fees, was performed by a third-party administrator, Far West. Far West entered into Administrative Services Agreements with both CMT and Kennesaw, and it essentially performed the same administrative function for both of them. (1SR-3-30.)

By the terms of its Administrative Services Agreement with Kennesaw (Kennesaw Trial Exhibit No. 2), Far West was authorized to perform a variety of services,

---

[1]The Findings of Fact issued by the United States District Court in this case, a copy of which is contained in the Appendix, are hereinafter referred to as "FF". Further, CMA cites to the district court record in accordance with the rules issued by the Court of Appeals for the Eleventh Circuit.

including the collection of insurance premiums on behalf of Kennesaw. The collection and transmission of such premiums to Kennesaw is discussed in Annex A to the agreement.

Under Annex A, Far West agreed that insurance premiums and other fees would be collected in a "lock box account," that there would be a "daily" reconciliation between the amounts received and deposited, and that "net premiums" due Kennesaw would be forwarded "weekly" to NBG. Such net premiums were to be deposited in a "holding account." Annex A provides that Far West "also agrees to the placement of the Company's [Kennesaw's] name on the documents governing this 'holding account'."

Thus, funds should have been received by Far West on behalf of CMT for the insurance provided by the two Kennesaw policies, and, in theory, such funds should have been reconciled on a daily basis and transferred to a "holding account" in the name of Kennesaw at NBG on a weekly basis. In practice, however, the method by which funds were received in California and ultimately transferred to NGB bore no relationship to the plan set forth in the Administrative Services Agreement.

Preliminarily, no "holding account" was ever established at NBG in Kennesaw's name. Instead, as the trial court concluded, a custodial account *for CMT* was established at NBG, as required by the document creating CMT, the Restatement of Trust.

The Restatement of Trust (CMA Trial Exhibit No. 1) provided in its Article 15 for the appointment of a Custodial Trustee to hold and manage COMPETE trust funds. Further, pursuant to Article 5, Section 5.28, of the Restatement of Trust, NBG was to be appointed the Custodial Trustee for the COMPETE Master Trust.

The appointment of NBG as the Custodial Trustee was accomplished by a Resolution of the COMPETE Benefit Advisory Committee, dated June 26, 1981 (CMA Trial Exhibit No. 2.) The Resolution was sent to NBG by Gordon Eldridge's letter of July 14, 1981 to Raymond Sapp, then a Vice President of NBG. (CMA Trial Exhibit No. 3.) To be effective, NBG has to accept the appointment, which NBG did by a letter to Mr. Eldridge dated September 1, 1981, from Jack H. Lamb, a Vice President of NBG. (CMA Trial Exhibit No. 4; FF 9, 10, 11.) Significantly, as discussed in Section 3, *infra,* all of the witnesses with any personal knowledge testified at trial that the NBG account in dispute constituted the custodial trustee account.

As noted above, funds were transferred to NBG in a totally haphazard manner. First, Kennesaw premiums were commingled with premiums due other insurers from the very beginning. By the terms of the Administrative Services Agreement, Kennesaw allowed Far West to bill CMT participants, in a single bill, for (1) association dues for COMPETE, (2) prepaid legal costs, (3) a "Group Adjustment Factor" not to exceed $25 per employer, (4) panel maintenance fees, and (5) insurance or reinsurance premiums *due other insurers.* (Kennesaw Trial Exhibit 2, Annex "A"; 1SR-1-104, 105, 106.) Thus, the bills "commingled" the obligations of numerous entities, including Kennesaw; and when such bills were paid, funds were collected in a commingled state.

Second, upon receipt, these funds were further commingled with additional funds received by Far West, COMPETE, the COMPETE Master Trust, FinComp, Legal Maintenance Organization, Professional Management Group and all of the other entities in the Far West empire. (1SR-1-104, 105, 106.)

Third, the ultimate transfer of funds to NBG bore no relationship to Kennesaw's plan. As established by the

testimony at trial, no holding account in Kennesaw's name was ever established, transfers were not made on a weekly basis nor were transfers made on a basis bearing any relationship to the accrual of premium owing to Kennesaw. Rather, transfers were made on a haphazard basis to the NBG account opened in the name of CMT, not Kennesaw.

Finally, at trial, Kennesaw was unable to trace the flow of its premiums into the NBG account at issue, or to account for approximately $200,000 in funds which it received from Far West.

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS OPINION VIOLATES RULE 52(a) BY SUBSTITUTING THE VIEW OF THE APPELLATE COURT FOR THAT OF THE TRIAL JUDGE

Rule 52(a) of the Federal Rules of Civil Procedure states the fundamental principle that findings of fact of a trial court shall not be set aside "unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." In *Anderson v. City of Bessemer City, N.C.*, ____ U.S. ____, 105 S. Ct. 1504 (1985), this Court recently reconsidered the meaning of Rule 52(a)'s commandment in a case procedurally indistinguishable from the present dispute.

In *Anderson*, the district court, in a judge trial, found in favor of the plaintiff in a sex discrimination lawsuit. The Court of Appeals for the Fourth Circuit reversed the finding of discrimination. The Supreme Court concluded that the Court of Appeals had "misapprehended and misapplied the clearly erroneous standard" and therefore reversed the Court of Appeals' decision.

In *Anderson*, this Court emphasized the properly limited role of a federal court of appeals. Specifically, if the

district court's "account of the evidence is plausible," the "court of appeals may not reverse . . . even though convinced that had it been sitting as a trier of fact, it would have weighed the evidence differently." *Anderson, supra* at 1511. Stated somewhat differently, a "reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court." *Anderson, supra* at 1511. These roles apply even if "credibility determinations" *are not* a factor. *Anderson, supra* at 1512. Of course, if credibility is a factor, Rule 52 "demands even greater deference" since "only the trial judge" saw the witnesses. *Anderson, supra* at 1512. Fundamentally, a court of appeals cannot, under the guise of "close scrutiny of the record," conduct a "*de novo* weighing of the evidence." *Anderson, supra* at 1513.

CMA begins with the statement of these principles precisely because the Court of Appeals' decision, respectfully, wholly ignored them. What the Eleventh Circuit panel claims was a review of "the record in detail" was in fact no different than the *de novo* weighing of the evidence condemned in *Anderson*. *See* p. A-8 of Appendix. Even a casual review of the language in the Opinion demonstrates that the Court of Appeals conducted a reweighing of the facts.

In particular, the Eleventh Circuit concluded that the district court's Finding of Fact No. 9 was clearly erroneous. *See* p. A-11 of Appendix. That finding states, in part, as follows:

> "NBG was asked to, and later did, open an account which was intended to receive premium funds from CMT for the ultimate purpose of paying administrative expenses and benefits to insured employees."

Findings of Fact Nos. 10 and 11, respectively, provide as follows:

> "10. The NBG Trust account was maintained in the name of the COMPETE Master Trust, and was NBG account no. 56-1749-00.
>
> "11. NBG acted as Custodial Trustee under the terms of the Restatement of Trust dated June 19, 1981."

Taken together, these findings of fact establish that the account which is the subject of this lawsuit was an account of the COMPETE Master Trust, was a trust account established in accordance with the Restatement of Trust, and was not and could not be a Kennesaw account. Nevertheless, the Eleventh Circuit rejected *all* of these findings. This rejection occurred despite the existence of abundant evidence to support the district court's *factual findings.*

The Eleventh Circuit relied on the testimony, *on direct examination*, of Raymond Sapp, William J. Ruth, and Murray F. Rubin for the proposition that "the account was created solely to receive premium due to Kennesaw" for the 02 or fully-insured policy. *See* p. A-10 of Appendix. As the following discussion demonstrates, however, in each case the Eleventh's Circuit's reliance on selected direct testimony is misplaced: either the witness plainly stated that the account was a COMPETE account, established pursuant to the Restatement of Trust; or the witness had no personal knowledge of the creation or operation of the account; or the witness' credibility had to be considered by the district court judge.

RAYMOND SAPP

Mr. Sapp was the person at NBG responsible for the establishment of this account (1SR-2-164.) While the Eleventh Circuit relied solely on Mr. Sapp's direct testi-

mony, on cross-examination he testified that the account was opened in accordance with the terms of the COMPETE Master Trust, that NBG was a custodial trustee for the COMPETE Master Trust, and that the account was opened by the Benefit Committee of the COMPETE Master Trust. (1SR-3-4, 5, 6.) Further, Mr. Sapp testified that at the time this account was open he had not even *seen* the Administrative Services Agreement, the document which calls for the holding account. (1SR-3-6, 7.) The Eleventh Circuit Opinion is vague as to how Mr. Sapp could have known that this account was "created solely" for the benefit of Kennesaw when he had not even seen the Administrative Services Agreement. Mr. Sapp, however, was not vague. Mr. Sapp was asked, on cross-examination, if he had an understanding of the term "holding account", and he stated that he did not. The following exchange then occurred between Mr. Sapp and counsel for CMA:

> "Q. This was not the holding account, this was the custodial trustee account.
>
> "A. This was the trustee custodial account." (1SR-3-9.)

In short, when Mr. Sapp was cross-examined he was absolutely clear that the account in question was a COMPETE account, that it was what he termed a "trustee custodial account," and it was not the holding account urged by Kennesaw. Was there evidence to support the trial court's Findings of Fact Nos. 9 through 11? Of course there was.

WILLIAM J. RUTH

Mr. Ruth was formerly the president of Kennesaw and, as might be expected, had little to do with the actual operation of this account (1SR-1-108, 109.) Mr. Ruth had no specific knowledge on the timing of transfers to the account or even whether 01 premium funds (the non-fully-insured policy) were also deposited into this account

(1SR-1-109, 110, 111.) After having established that Mr. Ruth's personal knowledge was nearly nil, counsel for CMA asked the following:

> "Q. Now, this account is in the name of the COMPETE Master Trust, is it not?
>
> "A. I don't know how the account is styled but it was set up by the COMPETE people, yes. We were not a party to the account and to the trust, I should say." (1SR-1-111.)

How, based on this cross-examination testimony, is it possible to conclude, as the Eleventh Circuit did, that Mr. Ruth gave "compelling testimony," wholly ignored by the trial judge, that the account was solely for Kennesaw's benefit?

MURRAY F. RUBIN

Credibility is a major issue with regard to Mr. Rubin. It is true that Mr. Rubin was the former president of Far West and that, on direct, he insisted that the account was for Kennesaw's benefit. Ignoring for the moment the fact that Mr. Rubin was not present and was not involved in the establishment of this account (1SR-2-131, 132), and thus could only provide hearsay evidence, Mr. Rubin, on direct, also testified as to the purported operation of the account — how money was received in California and transferred to NBG. (1SR-2-117 through 124.)

On cross-examination, CMA established that Mr. Rubin knew nothing about the actual transfers to Georgia. First, at the time he resigned as president of Far West (November 13, 1981), only four or five of the numerous transfers to the NBG account had been made. (1SR-2-129.) Further, Mr. Rubin had nothing to do with the transfers from California to NBG. (1SR-2-126, 127.) Mr. Rubin's entire lack of personal knowledge culminated in the following cross-examination exchange:

"Q. What's the name of the account?

"A. At the National Bank, the proper designation, I really couldn't cite it off-hand." (1SR-2-132.)

Moreover, subsequent to resigning from Far West, Mr. Rubin went into the consulting business. Who was his major client? Kennesaw. (1SR-2-132,133.) Apparently, Mr. Rubin's lack of knowledge, coupled with his obvious bias, affected the weight the trial court gave to Mr. Rubin's testimony.

VIRGINIA MAINS

The Eleventh Circuit conveniently ignores the testimony of the one person at Kennesaw with *actual knowledge* of the account. Ms. Mains was the *Treasurer* of Kennesaw and did become involved in the operation of the account. (1SR-1-118, 123 through 126.) On cross-examination, her testimony regarding the account was explicit:

"Q. This account was the custodian trustee account, was it not?

"A. Yes.

"Q. And it was in the name of COMPETE, was it not?

"A. Yes." (1SR-1-134, 135.)

Moreover, despite the Eleventh Circuit's observation in its Opinion that in "actual operation" this account was handled solely by Kennesaw personnel and solely to collect Kennesaw premium (*see* p. A-11 of Appendix), Ms. Mains' testimony *wholly contradicts* these conclusions. Ms. Mains testified that "people in California" were authorized to draw on the account, that the "primary" company writing checks on the account was *Far West, not Kennesaw,* and that the purpose of the account was to pay "A and H, or the life claims" — a purpose wholly consistent with the Restatement of Trust (the document creat-

ing the COMPETE custodial account). (1SR-1-123 through 126.)

CMA has gone to some length to review testimony because, respectfully, the Eleventh Circuit's recitation of the facts just did not happen. The NBG account was not an account in Kennesaw's name, it was not an account that only Kennesaw could draw upon, it was not an account that was to receive premium money. It was a COMPETE account, and it was established pursuant to the Restatement of Trust — not the Administrative Services Agreement — for the purposes set forth in the Restatement of Trust. In short, there was overwhelming evidence to support the district court's Findings of Fact Nos. 9-11.

In *Anderson,* this Court went to great length to restate the effect of Rule 52. Apparently, the message of *Anderson* did not reach the Eleventh Circuit. This case presents a perfect opportunity to reaffirm and reemphasize principles essential to the operation of our federal court system.[2]

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[2]While not clear whether the objection was to any specific finding, the Eleventh Circuit insisted that the district court "erred in disregarding the probative value" of a resolution of the COMPETE Benefit Committee relating to the NBG account at issue. Respectfully, the error was the Eleventh Circuit's. The testimony regarding this resolution from Knox Dobbins, former in-house counsel for NBG, was that the resolution was defective because (1) it had not been signed by a majority of the Benefit Committee, as required by the Restatement of Trust, (2) it was not verified, and, (3) in any event, there was no proof of the authority of the one person who did sign the resolution. Without explanation, the Eleventh Circuit simply ignored this testimony. Moreover, the Eleventh Circuit admits its *own* weighing of facts (and violation of Rule 52(a)) in concluding as follows:

"In light of these facts and the circumstances surrounding the issuance of the resolution, the district court should have given this evidence due weight in determining ownership of the account." (*See* p. A-12 of Appendix.)

2. THE OPINION IGNORES THE REQUIREMENT OF TRACING

The Eleventh Circuit's Opinion concludes by deciding that the district court erred in not awarding Kennesaw the account, despite the undisputed fact that *Kennesaw could not trace the flow of its own funds into the NBG account. See* p. A-13 of Appendix. The Eleventh Circuit is fundamentally wrong in its assumption that Kennesaw can prevail on either of two theories: (1) that it was really the owner of the account, or (2) that it is not required to trace the flow of funds into the account. Rather, the requirement of tracing is *inescapable* because: (1) there is ample evidence that Kennesaw premium received in California was dissipated and that other non-Kennesaw funds were transferred to the NBG account, and (2) Kennesaw's "tracing" theory fails because Kennesaw cannot explain over $200,000 in transfers to the account in February 1982.

A. Dissipation of Premium

During the trial, CMA presented evidence relating to the flow of funds to the Far West/COMPETE companies from receipt in California to deposit in NBG. The bottom line, fully appreciated by the district court and acknowledged by the Eleventh Circuit, was that no tracing — whether precise or approximate — was possible. Further, what evidence there was demonstrated that Kennesaw premium received in California was dissipated. Thus, the fact that *some* amount of premium was owing to Kennesaw when the insolvency proceeding began, places Kennesaw in no different position than any of the thousands of wholly or partially unpaid creditors, including uncompensated insureds, of Far West, et al.

Immediately after its appointment as Receiver, CMA attempted to perform an investigation of the books and records of the Far West entities. One of the persons

involved in the investigation was Richard Michael Stone, an associate insurance examiner with the California Department of Insurance. (1SR-4-6; 1SR-3-95; FF 31.)

Mr. Stone summarized his findings in work papers which he prepared and produced at trial. One such document is a four-page flow chart depicting the receipt and distribution of funds by Far West and CMT for the period March 1981 to March 1982. (1SR-4-12, 13, 14; CMA Trial Exhibit No. 11; FF 32.) As Mr. Stone explained in detail at the trial, the flow chart begins on page 1 with the receipt of $17,620,931 in California in either of two COMPETE collection accounts. From this same $17.6 million, $11,918,678 was transferred to a separate account for COMPETE Premium Dues and another $473,313 was transferred to insurance companies other than Kennesaw.

Thus, premiums payable to Kennesaw were not segregated upon receipt into a separate account. Kennesaw premiums were initially received as part of a much larger fund of money including premiums payable to other insurers as well as funds owing to numerous other entities.[3]

From the approximately $12 million in "COMPETE Premium Dues," Mr. Stone was able to identify transfers to the CMT account at NBG of $1,532,904, as is reflected on page 2 of the flow chart. (1SR-3-17; FF 33, 39.) As with the initial $17.6 million fund, no attempt at segregation of Kennesaw's premiums was made when those funds were deposited in the West Coast account, and thus nothing prevented a diversion of such funds. In that regard, the Eleventh Circuit opinion, although acknowledging, fails to address the evidence that hundreds of thousands of dollars were in fact diverted from the West

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[3]The Eleventh Circuit even acknowledged this commingling in its opinion at footnote 3. The Eleventh Circuit also acknowledged in footnote 3 that the evidence showed that Kennesaw premium had been dissipated.

Coast Bank COMPETE trust account holding Kennesaw premiums and that Kennesaw premiums were applied by Far West to other debts. *See* p A-7 of Appendix.

For example, evidence was produced at trial showing that from those accounts, Nicholas and Dana Nicholson (two principals of Far West) transferred $325,000 to establish a company called First Guaranty Funding Co. Even more significantly, the testimony from Paul R. Peffer,[4] the accounting manager at Far West from July 1981 through February 1, 1982, provided direct evidence that Far West had diverted Kennesaw premiums. (1SR-3-21, 25.)

Mr. Peffer began by testifying about the fact that as of November 1981, Far West was over $500,000 in arrears on payments to Kennesaw and that those premiums related to collections made by Far West as far back as July 1981. He also discussed the fact that Kennesaw had demanded all such payments from Far West and that Far West and Kennesaw had agreed to work out a repayment schedule. (1SR-3-44, 45.) According to Mr. Peffer's testimony:

> "There was no way that, there just wasn't the money in the West Coast account to transfer the four hundred thousand or five hundred thousand dollars that they were behind all at once, so they needed some time to make those payments in lump sums of fifty thousand, one hundred thousand, whatever." (1SR-3-52, 53.)

Mr. Peffer then testified that Steve Twergo, Far West's Vice President of Finance, told him that Kennesaw's premium dollars had gone to pay claims on the [non-Kennesaw] self-funded business. Mr. Peffer noted that he was told that Kennesaw had threatened to terminate its

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[4]Both Kennesaw and CMA read portions of Mr. Peffer's deposition testimony into the record.

agreement with Far West unless it received the back payments. (1SR-3-43, 53.)

Mr. Michael Kruger, the President of Kennesaw, also testified at trial about Far West's serious trust arrearage. According to this testimony, as of year-end 1981, Far West was behind by as much as $600,000 in premiums. (1SR-2-42.) He further testified that when he went to Far West in February 1982, shortly before it went into receivership, he obtained a $385,356.00 payment in the form of a cashier's check. According to Mr. Kruger, he requested the cashier's check because "[U]pon visiting I had noted a general deterioration during late January and February of 1982 in the organizations there, and I didn't know, I wanted to protect the assets of Kennesaw, so I requested they issue me on [sic] check on the spot." (1SR-1-167, 168.)

Significantly, Mr. Kruger also admitted that Kennesaw chose not to deposit the cashier's check into the NBG account, but into another account, one bearing *Kennesaw's* name. (1SR-1-169.)

In summary, for a one-year period CMT received approximately $17.6 million. Of that total, less than 9 percent ultimately was transferred to the NBG bank account in dispute, and that 9 percent was commingled with funds from a variety of sources in the West Coast Bank account. Furthermore, monies collected by Far West on behalf of Kennesaw and deposited into the West Coast Bank account were diverted by Far West and used to pay non-Kennesaw claims.

Based upon the foregoing facts, tracing is required for two reasons. First, the NBG account was opened under the name COMPETE Master Trust and, presumptively, the balance in the account belongs to CMT. *See Rupali*

Bank v. Provident National Bank, 403 F.Supp. 1285, 1289 (E.D. Pa. 1975).[5]

Second, the CMT account, as discussed above, consisted of commingled funds. It is well settled that when a trust beneficiary seeks to recover alleged trust funds from an account containing commingled funds, tracing is mandatory. *See, e.g. Schuyler v. Littlefield*, 232 U.S. 707, 713 (1914); *Cunningham v. Brown*, 265 U.S. 1, 11-13 (1924); *Rosenberg v. Collins*, 624 F.2d 659, 663 (5th Cir. 1980); *Sonnenschein v. Reliance Ins. Co.*, 353 F.2d 935, 937 (2d Cir. 1965); *Wichita Royalty Co. v. City National Bank of Wichita Falls*, 109 F.2d 299, 303 (5th Cir. 1940).

The burden of tracing trust property is placed upon the beneficiary seeking to recover such property in an effort to ensure equality among a debtor's creditors. If a beneficiary meets this burden, it has the right to an equitable lien or constructive trust upon the commingled fund. 5 A.W. Scott, *Scott on Trusts*, § 519 at 3639 (3d ed. 1967). However, such burden cannot be discharged merely by the showing that the account in question contains funds equal to, or in excess of, the amount of the beneficiary's claim against such account. *St. Louis & S.F.R. Company v. Spiller*, 274 U.S. 304, 310 (1927). Allowing trust beneficiaries to easily secure preferences would subvert the principle that "equality is equity"; the fundamental rule of insolvency law. *Elliott v. Bumb*, 356 F.2d 749, 754 (9th Cir.), *cert. denied*, 385 U.S. 882 (1966); *Cunningham v. Brown*, 265 U.S. 1, 13 (1924).

Georgia tracing cases, while limited in number, apply the same principles. The three leading cases appear to be *G. Ober & Sons Co. v. Cochran*, 118 Ga. 396, 45 S.E. 382 (1903), *Miller & Co. v. Gibbs*, 161 Ga. 698, 132 S.E.

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[5]Even the Eleventh Circuit acknowledges "that the name or title of a bank account creates a presumption of ownership in the titleholder." *See* p. A-8 through A-9 of Appendix.

626 (1926), and *Parker v. Harling,* 200 S.E. 800 (Ga. 1939).

In *Ober,* the Ober Company sent a $506 note to New South Savings Bank for collection. The note was collected, but rather than remitting the money, the bank put the money into "its own business." *Ober, supra* at 383. When the bank failed shortly thereafter, Ober Company remained unpaid.

Following the bank's failure, the affairs of the bank were placed in the hands of a receiver. After investigation, the receiver reported to the court that he found the sum of $29.52 in the vaults of the bank, a sum insufficient to satisfy the numerous claims against the bank. *Ober, supra* at 383. Ober Company insisted that it was entitled "to an equitable lien on the funds in the hands of the receiver as against the general creditors of the bank . . ." *Ober, supra* at 383. The Georgia Supreme Court reviewed extensive English law on the topic of tracing and concluded that while Ober Company could trace the receipt of its funds to the bank, it could not trace it further and thus had failed to sustain its burden of proof. *Ober, supra* at 384.

The second leading Georgia case is *Miller & Co. v. Gibbs,* 161 Ga. 698, 132 S.E. 626 (1926). In *Miller,* two brothers operated B. H. Malcolm & Bros. Co. In 1913, Agnes L. Malcolm, the wife of B. H. Malcolm, died and Mr. Malcolm received $5,019 in life insurance proceeds as a result of his wife's death. That money was put into the partnership by Mr. Malcolm. *Miller, supra* at 628. In 1920, B. H. Malcolm died. In that same year, his brother executed a deed to Miller & Co. to secure an indebtedness of approximately $30,000. Two years later, the business failed.

One of the claimants to the remaining funds of the partnership was the administratrix of Agnes L. Malcolm's

estate, who asserted that the $5,019 should be given preference and impressed with the lien. Miller & Co., seeking to recover the money it had advanced, opposed the request. The Supreme Court decided in favor of the widow's administratrix, concluding that the administratrix had sufficiently traced the funds. Specifically, the Supreme Court stated:

> "If it can be shown that the trust property or its proceeds have gone directly into the estate or person misapplying the trust funds, that the trust property or its proceeds are found to reside in the assets of such trustee or person at the time when the claim is asserted, and *that the same have not been expended or dissipated for any purpose in the business of the trust or of such person,* then equity will impress the estate of the trustee or person with a trust in favor of the beneficiary of the trust property, to the extent of the trust funds so misappropriated." (Emphasis added.)

The final Georgia case, *Parker v. Harling,* 200 S.E. 800 (Ga. 1939), decided after the *Ober* and *Miller* decisions, further illustrates the flaw in the Eleventh Circuit's refusal to consider the requirement of tracing. In *Parker,* the Supreme Court reversed a trial court decision directing a verdict for a party seeking to impress a trust upon a piece of property. The plaintiff had recovered a judgment against a defendant's husband and alleged that thereafter the husband, to avoid payment of the judgment, conveyed to his wife (defendant) certain real property, that the wife thereafter exchanged such property for other property, sold the new property, deposited the proceeds in her bank account and used them to purchase an additional piece of property. Plaintiff claimed that the original property was encumbered with a trust in his favor and that under the principle of tracing funds, the property finally acquired by the wife should be impressed with the trust to the extent of his judgment.

In reversing the trial court's directed verdict in favor of plaintiff, the Georgia Supreme Court noted the wife had testified that she did not buy the final piece of property with the specific money received from the sale of the property originally transferred to her by her husband. Rather, the wife testified that she had purchased the property *with other funds that she had in that same bank account at the time of the purchase.* The Supreme Court, citing as authority, among other decisions, the *Ober* case, concluded at page 802 that based on such evidence "a finding for the plaintiff was not demanded on the issue of tracing funds."

In short, in *Parker,* while the plaintiff was able to show that funds impressed with a trust in his favor went into a particular account, since other funds were deposited into that same account, he was unable to show that the particular funds impressed with his trust had been used to purchase the real estate in dispute. Stated differently, he was unable to trace his specific dollars into the final piece of property. Likewise, in this case, the evidence is *undisputed* that the account in California from which transfers were made to the NBG account — the West Coast Bank Account — contained funds which were *not Kennesaw premium.* Indeed, during the one-year period from March 1981 to March 1982, approximately $11.9 million passed through this account in California. Of that sum, approximately $1.5 million was transferred to NBG. As in *Parker,* it is impossible to find that only Kennesaw premiums were remitted to NBG — particularly in light of the evidence presented regarding Far West's diversion of Kennesaw's premiums.

In sum, even assuming the Eleventh Circuit was correct in conducting a *de novo* review of the evidence and in finding that the NBG account itself was a Kennesaw, and not a CMT, account, the Eleventh Circuit was clearly not correct in ignoring the tracing requirements of Georgia

law. Stated differently, under Georgia law, in order to obtain control over the funds in a bank account from an insolvent entity, a party must *prove* that the account itself is that party's *and,* most importantly, that the funds contained in that account are its actual funds — and not funds taken from others in a distress situation — which is what occurred here. Significantly, despite the considerable authority requiring tracing, the Eleventh Circuit failed to cite *any* authority for its holding that tracing can be disregarded.

B. The $200,000 Windfall

To all the foregoing, the Eleventh Circuit effectively said "so what." In the Eleventh Circuit's view, the account was really Kennesaw's and therefore no tracing of any kind was required. This conclusion, however, ignored Kennesaw's theory of its own case.

Kennesaw justified its claim to a fund held in the name of COMPETE by its balancing theory. In the district court, Kennesaw attempted to prove that the amount of premium owing to it roughly equalled payments received from Far West *plus* the amount in the NBG account. Indeed, that is the entire purpose of Kennesaw's Exhibit 1, a massive compilation of premium runs which attempts to balance the premium earned figure with payment received *plus* the amount in the NBG account. According to Kennesaw, there is less than a $3,800 discrepancy, a figure its accountants insist is not material. (1SR-3-75, 76.) Thus, Kennesaw argued at trial that since the two figures (premium owing vs. pay-out record, plus the NBG account) roughly balanced, this proved that the fund belonged to Kennesaw.

The district court rejected the "tracing" theory for the reasons stated in the preceding section of this petition. Accordingly, there was never any need to scrutinize Ken-

nesaw's theory. However, the evidence at trial demonstrated that such theory cannot withstand inspection.

Finding of Fact No. 44 states that in February 1982, approximately $200,000 was paid to a Kennesaw account — not the COMPETE account that is the subject of this lawsuit — which transfers cannot be accounted for by Kennesaw. *See* p. B-9 of Appendix. None of Kennesaw's calculations designed to show a "balance" between the amount in the NBG account and the amount owing to Kennesaw considers these transfers. Absent these transfers, Kennesaw claims to balance within $4,000. Obviously, considering these transfers, Kennesaw will receive *$200,000 more than it claims to be owed.*

This astounding result stems from the Eleventh Circuit's simplistic analysis. Presumably, it would not have mattered to the Eleventh Circuit if there had been $50,000 or $5,000,000 in the NBG account, because it was really a Kennesaw account. It does matter to the thousands of patients and medical providers who are unpaid. To permit Kennesaw to recover more than it is owed in these circumstances is obviously unjust.

CONCLUSION

This case raises a fundamental question regarding the inherently limited role of appellate courts. Respectfully, CMA submits that the Eleventh Circuit opinion is nothing more than the *de novo* trial procedure recently condemned by this Court in *Anderson v. City of Bessemer City, N.C.* The "clearly erroneous" standard of appellate review exists for several good reasons, and, by the Eleventh Circuit's failure to apply that standard properly, it has vastly overstepped the bounds accorded an appellate court. Its conduct here is even more troublesome in light of its further failure to properly apply certain controlling principles of Georgia state law.

For the foregoing reasons, CMA respectfully requests that a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

BARGER & WOLEN
KENT KELLER
GAIL E. COHEN
LARRY M. GOLUB
530 West 6th Street,
Ninth Floor
Los Angeles, California 90014
Attorneys for Petitioner

EXHIBIT A

NATIONAL BANK OF GEORGIA,
Plaintiff,

v.

KENNESAW LIFE AND ACCIDENT INSURANCE COMPANY,
Defendant-Appellant,

Credit Management Association of Southern California,
Defendant-Appellee.
No. 85-8782

United States Court of Appeals,
Eleventh Circuit.

Oct. 7, 1986.

Opinion of the Court of Appeals for the Eleventh Circuit

Bank brought interpleader action against receiver for organization providing various insurance programs and against carrier for organization to determine ownership of trust account in organization's name. The United States District Court for the Northern District of Georgia, No. C82-676A, Richard C. Freeman, J., awarded account to receiver, and carrier appealed. The Court of Appeals, Clark, Circuit Judge, held that carrier rebutted presumption of ownership by organization and was owner of account.

Reversed.

1. Insurance — 31.1

Trust account, which was in name of organization providing group insurance programs and presumably be-

longed to organization, which was created by personnel of organization, insurance program manager, and carrier, which was created to pay premiums due to carrier and was not created to pay administrative expenses and benefits to organization's participants, which was used for deposit of premiums owed to carrier, which was in control of carrier according to resolution of organization's benefit committee, and which contained carrier's investment income separate from other money, belonged to carrier under Georgia law, rather than organization, even though carrier's funds were not traceable.

2. Insurance — 31.1

Evidence failed to support district court's conclusion that purpose of trust account in name of organization providing group insurance programs was to pay administrative expenses and benefits to organization's participants and established that account was created to pay premiums due to carrier under Georgia law.

3. Insurance — 31.1

Resolution of benefit committee of organization providing group insurance programs, which granted full control to carrier over trust account in name of organization and which was adopted in conformity with practice of executing binding resolutions in manner different from that authorized by trust declaration, supported carrier's ownership of funds in trust account under Georgia law.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY, Chief Judge, CLARK, Circuit Judge, and GIBSON*, Senior Circuit Judge.

CLARK, Circuit Judge:

This appeal concerns an interpleader action filed by plaintiff-appellee National Bank of Georgia (NBG), disinterested stakeholder in a $450,000 bank account. NBG requested that the court below determine which of two claimants should receive the bank account. Defendant-appellee Credit Management Association claimed the account as receiver for Continental Organization of Medical, Professional and Technical Employees (COMPETE), an organization providing various insurance programs on a group basis to small employers and their employees. Credit Management argued that since the account was titled "COMPETE Master Trust," COMPETE had title to the funds therein. Defendant-appellant Kennesaw Life & Accident Insurance Company (Kennesaw) disagreed and claimed the account on two theories. First, Kennesaw argued that despite the name on the account, it was the true owner of the account. Second, Kennesaw argued in the alternative that even if it was not the owner of the account itself, it had a superior right to the funds therein because they constitute trust funds held by COMPETE on behalf of Kennesaw. The district court rejected Kennesaw's arguments and awarded the funds to Credit Management. Kennesaw appeals, asserting errors of fact and law. We reverse.

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*Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

I. FACTS

In March, 1981, COMPETE organized a trust to offer various insurance benefits[1] to employees of its employer members. According to the Declaration of Trust, the trust's principal purpose was to provide benefits by purchasing policies of insurance from independent insurance companies. The trust was also authorized to pay benefits directly from membership dues, in lieu of or in addition to procuring insurance policies. In fact, both fully insured and self-insured programs were offered to members.

All membership dues, after deduction of various expenses, were to comprise a trust fund. A custodial trustee was to be appointed to receive and hold all trust assets, including the fund, in its own name or that of a nominee. Disbursement could be made only on the written direction of the trust's Benefit Committee. No investment of the fund was required unless directed by the benefit committee. Although NBG was the duly appointed custodial trustee for that portion of the fund to be used for payment of Kennesaw premiums, it never held any trust assets. It held only the bank account at issue.

Collection of the trust fund was not managed by COMPETE or its custodial trustee. Instead, COMPETE contracted with one of its affiliated companies, Far West Administrators, Inc. (Far West), to collect membership dues, deduct commissions and expenses, forward premiums to insurance carriers and pay benefits to employees either on behalf of the carriers or COMPETE's self-insurance programs.

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[1]Benefits included life, health and accident, vision and dental care, and legal services.

Among the carriers providing insurance to COMPETE's members was appellant Kennesaw. At the time the trust was organized in March, 1981, Kennesaw issued a master policy to COMPETE in order to pay benefits in excess of $25,000 on the trust's self-insured programs. In July, 1981, Kennesaw issued the trust a second but fully insured policy for life, health and accident benefits. At about the same time, Kennesaw entered into an Administrative Services Agreement with Far West, requiring Far West to provide the same types of services to Kennesaw as those rendered under Far West's agreement with COMPETE.

The Services Agreement also contained detailed instructions for the handling of monies due Kennesaw. To a certain extent, these instructions overlapped with provisions in the previously described Declaration of Trust. Membership dues, including pro-rated premiums, were to be sent by members to a bank lock box in California, where Far West would collect them on a daily basis. Kennesaw's premiums were to be broken out from those of other carriers, commissions and service fees deducted, and then the net amount deposited weekly in a "holding account." Funds in the holding account would then be deposited in Kennesaw checking accounts for purposes of paying claims under Kennesaw's fully insured COMPETE policy. Kennesaw and Far West shared authority to write checks on those accounts but only Kennesaw had the right to invest the holding and checking account funds. According to the Agreement, the holding account was to be opened in trust for Kennesaw, not by Far West but by COMPETE as the master policyholder. COMPETE's acceptance of this provision was evidenced by its signature on the service agreement.

The bank account which is the subject of this litigation was opened at NBG in late June or early July under the name "COMPETE Master Trust." This was in conjunction with the inception of the policy fully insuring beneficiaries for life, health and accident coverage. From July, 1981 to February, 1982, Far West deposited various sums into the account. Periodically, a portion of the sums were transferred by NBG into certain checking accounts titled "Kennesaw A & H Claims Payment" and "Kennesaw Life Claims Payment." The balance of the COMPETE account was then invested at the direction of Kennesaw. Problems soon developed, however, as deposits were not made weekly in accordance with the Services Agreement. By November, 1981, premium remittances had fallen in arrears by $500,000. Kennesaw demanded that the account be made current, and Far West complied in part by January, 1982. Two months later, Kennesaw realized that both Far West and COMPETE were in deep financial trouble. Kennesaw requested that NBG turn over all funds in the account at issue. At approximately the same time, NBG received a similar request from Credit Management Association as receiver for Far West.[2] Faced with these conflicting demands, NBG paid the funds into the court registry and filed this interpleader action to determine rightful ownership of the funds.

The district court conducted a bench trial on the issue of ownership and held that the funds presumptively belonged to COMPETE as title holder of the account. The court also found that the account had been opened as the Custodial Account described in the Declaration of Trust, and NBG had been appointed custodial trustee. Under

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[2]At the time of its request, Credit Management was receiver only for Far West. Subsequently, it was appointed receiver for COMPETE, the COMPETE trust, and other affiliated entities.

the Declaration, the purpose of the account was to pay benefits to employee beneficiaries. Consistent with this purpose, the court found evidence that the funds in the account had been drawn from the general receipts of COMPETE and not simply that portion representing premiums due to Kennesaw.[3] In light of these facts, Kennesaw had no right to the funds under the Services Agreement with Far West.

According to the district court, Kennesaw could claim against the account only to the extent it could prove that the money in the NBG account was the same money which Far West had collected as Kennesaw premiums in the California lock box. The court found that Kennesaw had failed to trace the funds satisfactorily through the Far West and COMPETE accounts in California. In fact, the evidence showed that some or all of the money actually collected as Kennesaw premiums had been dissipated or used by COMPETE for purposes other than payment of premiums. Consequently, Kennesaw had no right to any of the funds in the NBG account. Judgment was entered in favor of COMPETE's receiver, Credit Management.

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[3]The court's conclusion about the source of the funds in the account rested on detailed testimony about the flow of funds from the California lock box to the NBG account. Contrary to the Services Agreement, membership dues were not properly segregated nor promptly deposited in the NBG account. Instead funds which should have gone to Kenneseaw remained commingled with COMPETE's other funds. The money was then transferred to one of two COMPETE accounts in California, from which COMPETE paid general expenses. At times the funds in these accounts, including the premiums due Kennesaw, were entirely dissipated on COMPETE general expenditures. Thus the funds later transferred to NBG were comprised not only of premiums earmarked for Kennesaw but also general funds of COMPETE forwarded to make up for dissipated premiums. *See* Trial Record Vol. 4, pp. 12-20.

II. ISSUES ON APPEAL

Appellant Kenneseaw contests the district court's award of the funds to the receiver on two grounds. First, Kennesaw claims that the district court erred in not recognizing its ownership of the bank account at issue. Kennesaw contents that it rebutted any presumption of ownership in COMPETE by demonstrating that the account was opened pursuant to the Services Agreement and designed to receive only premiums due to Kennesaw, not general funds of COMPETE. Thus, Kennesaw is the true owner of the account and has a legal right to the funds at issue, without resort to tracing.

Second, Kennesaw argues that even if the district court was correct in finding legal title to the account in COMPETE, it nonetheless erred in rejecting Kennesaw's equitable claim to the funds. Kennesaw argued that premiums had been collected in trust for its benefit and then deposited in the account at issue. Therefore, it should collect the funds. The district court accepted Kennesaw's equitable theory but found the proof insufficient. Kennesaw asserts that the court required an excessive amount of tracing. Kennesaw claims that under applicable law, it need only show that its premiums were received in trust by Far West and ultimately segregated in the account at issue.

III. DISCUSSION

Having reviewed the record in detail, we find that the district court should have held for Kennesaw on the first theory advanced, its legal ownership of the account. The correct standard for ownership in this case is determined by Georgia law since all the parties in their various agreements selected that law as controlling. Like most states, Georgia recognizes that the name or title of a bank

account creates a presumption of ownership in the titleholder. *See Granade v. Augusta Fire Department Credit Union*, 118 Ga.App. 157, 162 S.E.2d 870 (1968). That presumption, however, is rebuttable and ownership may be placed in some entity other than the titleholder. *See id.* 162 S.E.2d at 872.

The lower court in this case acknowledged these principles in its opinion, but then failed to apply them to the evidence presented. Instead, the district court looked to the title of the account and considered whether the creation of a "COMPETE Master Trust" account was more consistent with the provisions of the Declaration of Trust or with Kennesaw's Services Agreement with Far West. Since the Services Agreement required a "holding account" rather than a trust account,[4] the court awarded ownership to COMPETE and its receiver.

We concede that this method of analysis greatly simplifies the matter of ownership, an issue complicated by the existence of several interrelated parties, vague agreements creating dual loyalties, and esoteric insurance practices. Nonetheless, such a narrow approach is clearly inconsistent with the breadth of inquiry required by Georgia law. Ownership of the account depends not only upon the account title and the trust and contract documents in evidence, but also upon the actual operation of the account. Particularly important are facts concerning

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[4]It is not clear whether the Services Agreement actually required the title "Kennesaw Holding Account" or merely used that designation as a defined term for clarity and brevity in the Agreement. Furthermore, the account title did not match the provisions of trust Declaration any better than it fit the Services Agreement. The Declaration stated that any account created pursuant to it should be held in the custodian's name or the name of a nominee. NBG's name never appeared on the account at issue, nor was the trust its nominee.

which party opened the account, which party controlled the account, *see Granade, supra,* the source of the funds, *see Eagle & Phenix Mfg. Co. v. Belcher,* 89 Ga. 218, 15 S.E. 482 (1892), and their purpose, *Mayer v. Chattahoochee National Bank,* 51 Ga. 325 (1874).

[1] Here the account was opened by personnel from COMPETE, Far West and Kennesaw. Witnesses from Far West, Kennesaw and NBG all testified that the account was created solely to receive premiums due to Kennesaw for COMPETE's health, accident and life policy.[5] When Kennesaw realized that its name did not appear in the account title, it requested a resolution from the COMPETE Benefit Committee granting it full control over the account. This resolution was issued in September, 1981, and was honored by NBG until the receiver made a claim against the account in March, 1982. Prior to that time, NBG considered Kennesaw the bank customer for this account and it sent all bank statements to Kennesaw.

Indeed, Kennesaw's interest in the account was so clear to all parties involved that the disbursement and investment policy for the account was set solely with regard to Kennesaw's needs and goals without consultation or approval from COMPETE.[6] As originally conceived, premium funds would be deposited into the account by Far

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[5]See testimony of William J. Ruth, former president of Kennesaw, at Trial Record Vol. 1, p. 102; testimony of Murray F. Rubin, former president of Far West Administrators, at Trial Record Vol. 2, pp. 116-24; testimony of Raymond Sapp, former group vice president of the NBG trust department, at Trial Record Vol. 2, p. 165. Personnel from COMPETE did not appear at trial, as none could be located by the litigants.

[6]See testimony of Raymond Sapp at Trial Record Vol. 2, pp. 168-170.

West and then immediately transferred to Kennesaw checking accounts to facilitate payment of claims under Kennesaw's policy with COMPETE. Since this arrangement did not maximize Kennesaw's return on its premiums, Kennesaw elected to leave its premiums in the COMPETE trust account until needed for payment of specific claims. The trust account balance was then fully invested on a daily basis. Although the investment income remained in the trust account, NBG kept separate records for the investment income and considered it property of Kennesaw rather than COMPETE. Thus, the account's operation indicates that, despite its name, it belonged to Kennesaw rather than COMPETE.

[2] In light of this evidence, the district court was clearly erroneous in finding the following facts. First, the court erred in describing the purpose of this account as "paying administrative expenses and benefits" to COMPETE participants. The evidence clearly shows that the account was created to pay premiums due to Kennesaw. No administrative expenses were ever paid from this account since all expenses were deducted by Far West before funds were transferred to NBG. The fact that benefits were paid from this account is merely a reflection of the fact that all insurance benefits ultimately derive from premiums paid and the investment income accrued thereon. There is no question that Kennesaw has paid all benefits owed under its policy and that these benefits exceeded the amount in the account.[7]

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[7]The district court's conclusion might have been more plausible if the account at NBG were COMPETE's only account or if COMPETE had beneficiaries located in Georgia. The record indicates that virtually all beneficiaries resided in the western United States and that COMPETE maintained several accounts in California for the purpose of paying benefits. COMPETE's only ties to Georgia were its policies

[3] Second, the district court erred in disregarding the probative value of the COMPETE Benefit Committee resolution acknowledging Kennesaw's control over the account. The Court held that the resolution failed to pass control because it had not been executed in conformity with trust Declaration requirements. In fact, the Declaration states that valid resolutions may be executed in any manner approved by the Benefit Committee's bylaws, rules or regulations. Although those bylaws, rules and regulations were not put in evidence, the practices of the Benefit Committee were made clear by other evidence. The resolution appointing NBG custodial trustee was introduced at trial, bearing the same type of execution as the resolution acknowledging control. This fact suggests that the Benefit Committee had adopted a practice of executing binding resolutions in a manner different from that authorized by the Declaration. Indeed, NBG as custodial trustee seems to have been aware of this practice as it honored the resolution without question for almost six months. In light of these facts and the circumstances surrounding the issuance of the resolution, the district court should have given this evidence due weight in determining ownership of the account.

The district court likewise erred in certain of its conclusions of law. The district court found a presumption of ownership in favor of COMPETE and immediately proceeded to evaluate Kennesaw's claim to the funds on a trust fund tracing theory. Had the district court properly considered Kennesaw's rebuttal evidence on the purpose of the account and Kennesaw's control over it, the presumption in favor of COMPETE would have dissolved. All of the facts and circumstances surrounding the opera-

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with Kennesaw, which required remittance of premiums and thus a bank account in this state.

tion of the account indicate that it belonged to Kennesaw. Thus, the district court erred in not awarding Kennesaw the account, regardless of Kennesaw's inability to trace funds. The judgment of the district court is therefore

REVERSED.

EXHIBIT B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE NATIONAL BANK OF GEORGIA,
Plaintiff,

v.

KENNESAW LIFE & ACCIDENT INSURANCE COMPANY; CREDIT MANAGERS ASSOCIATION OF SOUTHERN CALIFORNIA, as Receiver OF FAR WEST ADMINISTRATORS, INC.; CONTINENTAL ORGANIZATION OF MEDICAL, PROFESSIONAL AND TECHNICAL EMPLOYEES,
Defendants.

Civil Action File No. C82-676A

Filed in Clerk's Office: May 28, 1985
Luther D. Thomas, Clerk
U.S.D.C. — Atlanta

Rec'd: June 5, 1985

ORDER

This interpleader case was tried from April 29 to May 2, 1985 before the Court sitting without a jury. Before the Court for decision are the petition of National Bank of Georgia ("NBG") for interpleader, the opposition thereto of Kennesaw Life & Accident Insurance Company ("Kennesaw"), Kennesaw's "counterclaim" against NBG, and the competing claims to the interpleader fund of Kennesaw and Credit Management Association of Southern California ("CMA") as receiver for certain insolvent parties. Having heard evidence presented by all parties, having read and considered the documentary

evidence presented at trial, having read and considered the briefs of the parties, and having heard and considered the arguments of the parties, the Court in conformity to F.R.C.P. Rule 52 now enters the following Findings of Fact and Conclusions of Law with respect to those issues.

I.

FINDINGS OF FACT

1. NBG is a national banking association having its principal office and place of business in Atlanta, Fulton County, Georgia.

2. Kennesaw is a corporation having its principal office and place of doing business in Atlanta, Fulton County, Georgia. Kennesaw is in the business of issuing policies of insurance providing various types of insurance coverage.

3. CMA is the duly appointed state court receiver for Far West Administrators, Inc. ("Far West"), the Continental Organization of Medical, Professional and Technical Employees ("COMPETE"), the COMPETE Master Trust ("CMT") and FinComp Insurance Marketing, Inc. ("FinComp"), pursuant to two court orders, dated March 12, 1982 and April 20, 1982 by the Orange County Superior Court, State of California.

4. Far West, COMPETE, CMT and FinComp are all insolvent.

5. The organization known as COMPETE offered health benefits to the employees of its employer members in exchange for periodic membership fees. Subsequent to March 1, 1981, COMPETE offered health care benefits through CMT. That trust was declared on February 21,

1981, and redeclared by a Restatement of Trusts, dated June 19, 1981.

6. Neither COMPETE nor CMT actually handled the administration of the insurance program. Instead, the administration was handled by Far West, which entered into administrative services agreements with both CMT and Kennesaw.

7. Effective March 1, 1981, Kennesaw issued policy number 600000001 ("the 01 Policy") to CMT. The 01 Policy was part of a "self-funded" insurance program, providing both life and health benefits on claims in excess of $25,000. The 01 Policy was in effect from March 1, 1981 to November 30, 1981.

8. Effective July 1, 1981, Kennesaw issued policy number 600000002 ("the 02 Policy") to CMT. The business insured by the 02 Policy is referred to as the "fully insured" business. As the name suggests, Kennesaw's obligation under this policy was to indemnify all losses falling within the terms of the policy. The 02 Policy was in effect through October, 1982. After February, 1982 it was directly managed and administered by Kennesaw.

9. In June, 1981, NBG was approached by William Ruth, Jr., then President of Kennesaw, and individuals representing CMT, and was asked to become Custodial Trustee under the Restatement of Trust. NBG was asked to, and later did, open an account which was intended to receive premium funds from CMT for the ultimate purpose of paying administrative expenses and benefits to insured employees.

10. The NBG Trust account was maintained in the name of COMPETE Master Trust, and was NBG account no. 56-1749-00.

11. NBG acted as Custodial Trustee under the terms of the Restatement of Trust dated June 19, 1981.

12. The Restatement of Trust provided that NBG was to take all directions and instructions from the COMPETE Benefit Advisory Committee. In September, 1981, NBG obtained a written resolution purportedly signed by the Chairman of the Benefit Advisory Committee allowing NBG to disburse funds from the trust account at Kennesaw's direction.

13. The Restatement of Trust provides that the Custodial Trustee may accept the written instructions of a majority of the Benefit Committee. NBG never received written instructions bearing the signatures of a majority of the Benefit Committee.

14. On or about June 23, 1981, Kennesaw and Far West executed an Administrative Services Agreement, effective April 1, 1981. By the terms of that Agreement, Far West was authorized to perform certain administrative services, including the collection of insurance premium on behalf of Kennesaw. The manner in which collection and transmission of such premiums to Kennesaw were to occur is discussed in Annex A to the Agreement.

15. By the terms of Annex A, Far West agreed that insurance premiums and other fees would be collected in a "lock box account," that there would be a "daily" reconciliation between the amounts received and deposited, and that "net premiums" due Kennesaw would be forwarded "weekly" to NBG. Such net premiums were to be deposited in a "holding account."

16. By the terms of Annex A, Kennesaw permitted Far West to bill CMT participants, in a single bill, for (1) association dues for COMPETE, (2) pre-paid legal costs,

(3) a "group adjustment factor" not to exceed $25 per employer, (4) panel maintenance fees, and (5) insurance or reinsurance premiums due other insurers. The bills, thereby, "commingled" the obligations of numerous entities, including Kennesaw, and when such bills were paid funds were submitted in a commingled state.

17. NBG was unaware of Administrative Services Agreement at the time the trust account was opened and did not know of it until sometime in 1982.

18. No transfers were made to the NBG account number 56-1749-00 in September, 1981 yet Kennesaw's records indicate that $121,150.69 was owing as premium on the 02 Policy for September, 1981. Kennesaw was unable to state when premiums for given months had been paid because of the lack of correlation between premiums earned and transfers made to NBG account number 56-1749-00.

19. Far West, on behalf of COMPETE and CMT, fell behind in payment of premiums on the 02 Policy by at least as much as $500,000. At such time Far West, COMPETE, and CMT did not have $500,000 and asked Kennesaw to agree to accept installment payments of $50,000 or $100,000 until the deficit could be eliminated.

20. In March, 1982, NBG received a copy of an order issued by the Superior Court for the County of Orange, State of California, at the request of the Department of Corporations placing Far West in receivership and naming CMA as Receiver.

21. Attorneys for CMA demanded that NBG disburse the trust account funds to CMA.

22. At the same time, Kennesaw claimed that the monies in the account belonged solely to it, and de-

manded that NBG ignore CMA's demand and disburse the Trust's funds to Kennesaw.

23. B. Knox Dobbins, Esq., who was in-house counsel to NBG at the time, testified that prior to the filing of this interpleader action William Ruth, President of Kennesaw, and Terry McKenna, Kennesaw's outside counsel, met with officers of NBG and Mr. Dobbins. He testified that Ruth and McKenna expressed concern that COMPETE and Far West were about to file bankruptcy proceedings, and that Kennesaw would have to litigate its claim to the trust account funds on the West Coast, a forum inconvenient to Kennesaw. Dobbins testified that both Ruth and McKenna urged NBG to file this interpleader action if NBG were unwilling to pay the funds over to Kennesaw directly.

24. William Ruth testified on behalf of Kennesaw. He was asked no questions regarding this conversation with Dobbins, and consequently did not refute it. Terry McKenna was called expressly to rebut Dobbins' testimony. However, his testimony was to the effect that he could not remember the conversation, as opposed to denying that it occurred.

25. The Court concludes as a matter of fact that the statements attributed to Kennesaw's president and attorney by Mr. Dobbins were in fact made, and relied on by NBG.

26. On April 2, 1982, NBG filed this interpleader action and paid into the registry of this court the trust account funds, in the sum of $456,548.24. The fund has been accruing interest to date. There is no dispute as to the correctness of the amount paid in by NBG.

27. NBG has made no claim to the Trust fund, other than a claim for its attorneys' fees and expenses incurred this action.

28. Mr. Dobbins testified that this action was filed because NBG received competing claims to the fund, was uncertain as to who was legally entitled to the fund, and believed that Kennesaw acquiesced in the filing of the action.

29. The Court finds that as a matter of fact that NBG acted in good faith in filing this interpleader action.

30. Meanwhile, and immediately after its appointment as Receiver, CMA attempted to perform an investigation of the books and records of the Far West entities. The investigation was made difficult by the absence of certain records as well as the absence of former employees. CMA did, however, collect all records of the Far West entities it could locate, and gathered approximately 600 boxes of documents for purposes of review.

31. To perform the investigation, CMA retained the private accounting firm of Goldfarb, Whitman & Cohen, with Allan I. Whitman being charged with general supervisory responsibilities. Also assisting the investigation were auditors from the California and Utah Departments of Insurance. One of the persons involved was Richard Michael Stone, an associate insurance examiner with the California Department of Insurance.

32. Mr. Stone summarized his findings in work papers which he prepared and gave to the Goldfarb firm. One of the documents he prepared is a four-page flow chart depicting the receipt and distribution of funds by Far West for the period March 81 through March 82.

33. The flow chart depicts the flow of approximately $17.6 million through Far West's various bank accounts.

Of the initial $17.6 million received by Far West, approximately $1.5 million, or less than 9% of the total, was ultimately transferred to the CMT account at NBG, account number 56-1749-00, the account in dispute.

34. Premiums payable to Kennesaw were not segregated upon receipt by Far West into a separate account. The Kennesaw premiums were initially received by Far West as part of a much larger sum of money including premiums payable to other insurers as well as funds owing to numerous other entities.

35. Further, the NBG trust account was never renamed a "holding account," as denominated in the administrative services agreement, nor was it ever in the name of any party other than CMT.

36. The $17,620,931 collected by Far West was initially deposited in either of two California bank accounts, a West Coast Bank or a Lloyds Bank account.

37. From the initial $17,620,931, $11,918,678 in COMPETE premium and dues was transferred to a third account, West Coast Bank account number 01-07326-5.

38. From West Coast Bank account number 01-07326-5, Nicholas and Dana Nicholson transferred $325,000 to a company called First Guaranty Funding Co. There is no explanation for this withdrawal from West Coast Bank account number 01-07326-5.

39. From West Coast Bank account number 01-07326-5 transfers of slightly more than $1.5 million were made to CMT account number 56-1749-00 at NBG.

40. Premiums for the 02 Policy were not remitted on a weekly or monthly basis. Such premium monies were used by Far West or COMPETE or CMT for purposes other than payment of premiums to Kennesaw.

41. All or part of the money transferred to CMT account number 56-1749-00 at NBG was drawn from sources other than actual Kennesaw premiums and the NBG account, therefore, contained commingled monies.

42. There is no correlation in time between the receipt of premium by Far West and the actual deposits into CMT account number 56-1749-00 at NBG. For example, in the month of January 1982, Coopers & Lybrand, Kennesaw's accounting firm, states that Kennesaw earned premium on the 02 Policy of $467,835, yet over $847,000 was deposited into the account during that month. By contrast, in October 1981, Coopers & Lybrand states that Kennesaw earned premium on the 02 Policy of $230,362.63 yet only $63,942.77 was deposited in the NBG account number during that month.

43. In conducting its audit at Far West, Coopers & Lybrand never attempted to trace funds received by Far West through its various bank accounts to CMT account number 56-1749-00 at NBG.

44. In February, 1982 transfers of approximately $200,000 to a Kennesaw collection account were made, which transfers are not accounted for by Kennesaw.

45. If any of the foregoing Findings of Fact be claimed or held to constitute Conclusions of Law, they are incorporated below by reference.

II.

CONCLUSIONS OF LAW

1. This court has jurisdiction of this matter under 28 U.S.C. § 1335, there being diversity between the competing claimants to the interpleaded fund.

2. Venue is proper in this court.

3. The Court first considers the "counterclaim" Kennesaw has asserted against NBG. At trial, Kennesaw initially argued to the Court that NBG "knew" that the contested funds were Kennesaw's, that NBG should not have filed this interpleader action, and that in the event Kennesaw did *not* obtain the fund then it would have an action for damages against NBG for wrongfully filing this action. Kennesaw apparently abandoned that position during trial, and then asserted that in the event it *was* awarded the disputed fund it would be entitled to recover its fees and expenses, and other damages, incurred in this action.

4. This is a proper matter for interpleader under 28 U.S.C. § 1335. NBG was a disinterested stakeholder faced with adverse claims to the fund it held. NBG deposited the entire fund into court, and makes no claim against that fund but for its attorney's fees and expenses incurred in bringing this action. NBG acted in good faith in filing this interpleader. Consequently, NBG is entitled to discharge from this action, without liability to either contesting claimant. 28 U.S.C. § 1335; *Murphy v. Travelers Insurance Co.*, 534 F.2d 1155 (5th Cir. 1976) (Freeman, J.); 3A, *Moore's Federal Practice*, § 22.02(2) (2d Ed. 1976).

5. The Court finds that Kennesaw's "counterclaim" against NBG must fail for at least three reasons. First, as noted above, the filing of this interpleader by NBG was appropriate. Under such circumstances, a competing claimant is not entitled to recover its fees and expenses from the interpleading plaintiff. See citations above. Second, as will be seen below, the Court finds that Kennesaw was *not* entitled to the fund, thus both reinforcing the right of NBG to interplead the fund in the first instance, and negating any claim by Kennesaw that it was damaged

thereby. Third, Kennesaw's claim is undisputably in the nature of a compulsory counterclaim which was not pleaded at the time Kennesaw filed its original answer, some two years before the entry of the pretrial order filed in this case. The Court finds that Kennesaw's failure to assert its "counterclaim" against NBG at the time it filed its answer constituted a waiver of that claim. *Plant v. Blazer Financial Service, Inc.*, 598 F.2d 1357, 1361 (5th Cir. 1979); *United States v. Chatham*, 415 F. Supp. 1214 (N.D. Ga. 1976) (Freeman, J.).

6. Finally, the Court notes and gives credence to the testimony of Mr. Dobbins to the effect that Kennesaw's president and outside counsel both urged NBG to file this interpleader action. Under those facts, Kennesaw is estopped to now argue that NBG acted wrongly in filing this suit.

7. As to NBG's claim for attorney's fees and expenses, the Court grants leave to NBG to file said claim by affidavits and supporting briefs within ten days of the entry of this order. Any other party may have ten days from service of that application for filing any response it may desire. If after submission of NBG's application and any responsive papers any party requests a hearing on the issue of NBG's fees, the Court will set a time and date for such hearing. Any award to NBG will be taxed against the interpleaded fund.

8. As to the competing claims of CMA and Kennesaw the Court first notes that a bank deposit account presumptively belongs to the person or entity in whose name it is held. *Rupali Bank v. Provident National Bank*, 403 F. Supp. 1285, 1289 (E.D. Pa. 1975)

9. Since NBG account number 56-1749-00 is held in the name of the COMPETE Master Trust, the funds in

the account presumptively belong to the COMPETE Master Trust and Kennesaw has the burden of rebutting that presumption.

10. A trust beneficiary seeking to recover its money from commingled trust funds has the burden of (1) proving the existence of the trust and (2) tracing and identifying its specific trust fund into the trustee's estate. *Schuyler v. Littlefield,* 232 U.S. 707, 713 (1914); *Cunningham v. Brown,* 265 U.S. 1, 11-13; *Rosenberg v. Collins,* 624 F.2d 659, 663 (5th Cir. 1980); *Wichita Royalty v. City National Bank of Wichita Falls,* 109 F.2d 299, 303 (5th Cir. 1940); *Sonnenschein v. Reliance Insurance Co.,* 353 F.2d 935 (2d Cir. 1965); *Miller & Co. v. Gibbs,* 161 Ga. 698, 132 S.E. 626 (1926); *G. Ober & Sons Co. v. Cochran,* 118 Ga. 396, 45 S.E. 282 (1903); *Parker v. Harling,* 200 S.E. 800 (Ga. 1939); *Encyclopedia of Georgia Law* § 61 at 176-177.

11. In order to satisfy its burden of tracing, a trust beneficiary must show that its specific trust funds are in the estate of the insolvent entity and that those specific funds have not been expended or dissipated for any purpose in the business of the trustee. *G. Ober & Sons Co. v. Cochran,* 118 Ga. 396, 45 S.E. 382, 384 (1903); *Miller & Co. v. Gibbs,* 161 Ga. 698, 132 S.E. 626 (1926); *Parker v. Harling,* 200 S.E. 800 (Ga. 1939).

12. Where trust property has been commingled by a trustee, so that no part of it can be definitely traced and segregated, or identified as a part of any specific fund or property, the trust beneficiary is not entitled to a lien on the trustee's estate and becomes merely a general creditor of the estate. *Cunningham v. Brown,* 265 U.S. 1 (1924); *Sonnenschein v. Reliance Insurance Co.,* 353 F.2d 935 (2d Cir. 1965); *G. Ober & Sons Co. v. Cochran,* 118 Ga. 396, 45 S.E. 382 (1903).

13. Because Kennesaw seeks to impress a trust and impose a lien on the funds being held in the NBG account, it has the burden of proving the existence of the trust fund and of tracing its specific trust funds through Far West's bank accounts to the NBG account.

14. Because Kennesaw seeks to impress a trust and impose a lien on the funds being held in the NBG account, Kennesaw must show that the specific funds initially collected by Far West in the so-called lock box accounts were not expended or dissipated for any purpose in Far West's business.

15. Because Kennesaw seeks to impress a trust and impose a lien on the funds being held in the NBG account, Kennesaw must show that the source of funds transferred to NBG account number 56-1749-00 were comprised solely of Kennesaw trust funds, and not commingled funds.

16. Kennesaw has failed to satisfy its burden of proof by failing to trace its specific trust funds into NBG account number 56-1749-00, and by failing to show that its trust funds were not expended or dissipated for any purpose in Far West's business. Kennesaw is therefore a general creditor of the trustee's estate and CMA is entitled to recover all funds in NBG account number 56-1749-00.

17. If any of the foregoing conclusions of law be claimed or held to constitute Findings of Fact, they are incorporated in Section I, above, by reference.

18. In summary, NBG's suit in interpleader is allowed, Kennesaw's counterclaim against NBG is denied, NBG is discharged in this matter without further liability to any of the defendants with respect to the disputed fund, and NBG is given leave to submit an application for attorney's

fees by affidavit and brief. The fund presently in the possession of the Clerk of the Court, to wit, the principal sum of $456,548.24, together with all accrued interest, less any fee award to NBG, is awarded to Credit Managers Association of Southern California, as receiver for Far West, COMPETE, CMT and FinComp.

19. The Clerk is hereby directed to enter judgment accordingly.

SO ORDERED, this 28th day of May, 1985.

RICHARD C. FREEMAN, Judge,

United States District Court
for the Northern District
of Georgia, Atlanta Division

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On March 3, 1987, I served the within Petition for a Writ of Certiorari in re: "Credit Managers Association of Southern California vs Kennesaw Life" in the United States Supreme Court, October Term 1986, No. 86-....; on the Parties in said action, by placing three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Douglas L. Hallett, Esq.
Coudert Brothers
707 Wilshire Boulevard
Suite 4600
Los Angeles, California 90017

Dale A. Welke, Esq.
Lesley C. Elliott, Esq.
Adams, Duque & Hazeltine
523 West Sixth Street
Tenth Floor
Los Angeles, California 90014

Robert W. Beynart
Smith, Gambrell & Russell
2400 First Atlanta Tower
Atlanta, Georgia 30383-2501

William K. Carmichael
Stokes, Lazarus & Watson
3711 Roswell Road
Atlanta, Georgia 30042

Thomas N. Byrne
Sutherland, Asbill & Brennan
3100 First Atlanta Tower
Atlanta, Georgia 30383

William B. Brown
1940 Equitable Building
Atlanta, Georgia 30043

All Parties required to be Served have been Served.

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on March 3, 1987, at Los Angeles, California

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CE CE MEDINA